

**RICHARD C. KNIGHT**  
Claimant

**CONVENIENCE RESOURCE, INC.**  
Respondent

# KANSAS WORKERS COMPENSATION FUND

## ORDER

Claimant requested review of the February 24, 2006, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

## ISSUES

The Administrative Law Judge (ALJ) found that claimant did not suffer an accidental injury. After reviewing a surveillance videotape which failed to support claimant's testimony that he restricted the use of his shoulder, the ALJ denied the medical treatment requested by claimant.

Claimant argues that he suffered a compensable injury which arose out of and in the course of his employment. He claims the ALJ erred in admitting the surveillance videotape into evidence because (1) he had previously made a request for production of any videotape of claimant showing his job duties, and respondent failed to produce the videotape until after claimant's testimony at the preliminary hearing; (2) the ALJ reviewed the surveillance tape in private with no rebuttal evidence from claimant, and (3) the surveillance videotape was improperly admitted as impeachment evidence. He is requesting medical treatment from Dr. Joseph Sankoorikal and payment of a bill of Dr. Travis Oller in the amount of \$200.

Respondent requests that the ALJ's Order be affirmed. Respondent claims that the surveillance videotape was properly introduced as evidence, that claimant failed to give

timely notice of an injury, and that claimant failed to prove a compensable injury which arose out of and in the course of his employment.

The Kansas Workers Compensation Fund (Fund) requests that the ALJ's Order be affirmed, arguing that the surveillance tape was properly admitted as evidence and that the claimant failed to establish that he suffered from a work-related injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant worked as a clerk at a convenience store owned by respondent. He started in May 2004 and primarily ran the cash register, cleaned, and restocked shelves. In July or August 2005, claimant was changing the price of gas on the signs outside the store and carrying buckets of water and bags of trash when he began to notice problems in his right shoulder. He did not go to the doctor because the arm would be fine one day and hurt another day. Claimant had previous problems with his shoulder in 1992 when he injured it in a weightlifting class and again in 1999 or 2000 when he injured it lifting a desk while working at the Kansas University. He did not seek medical treatment in 1992. In 1999 or 2000, he was seen at Lawrence Memorial Hospital, where he was given a sling to wear. He testified that about five days later he had no more pain. He did not know if an accident form was filed and said he did not file a workers compensation claim. He assumed that Kansas University paid the medical bill from the hospital. When he started working for respondent in 2004, his shoulder was back to normal.

When claimant first started having problems with his shoulder, he made joking comments to his supervisor, Patrick Baumgartner, about it but did think it was serious because the pain would come and go. However, his pain began to get worse, and in the first part of October 2005, a couple of days after he was carrying two-gallon buckets of water outside, he told Mr. Baumgartner that his arm was really starting to bother him and he was thinking about filing a workers compensation claim. He also told Mr. Baumgartner about his pain when changing the signs. Mr. Baumgartner told him he could not file a workers compensation claim and if he did, he would not have a job there. Claimant continued to work but was scheduled for fewer and fewer hours until finally, at the end of November, he was no longer scheduled for any hours. At that time, claimant filed for unemployment benefits.

Claimant said he did not feel a tear at any time while he was working but felt an unpleasant heating sensation in his right shoulder to the point where he could not use his arm any longer. He testified that while he was at work, he would stick his hand in his shirt and use the shirt as a sling. There would be times he could raise his shoulder and times when he could not. He said that when he first got to work, his arm would work. But by the time he went home, he would not be able to drive with both hands on the steering wheel.

He said his pain was worse at the end of his tenure at respondent than in the summer of 2005 when he first started noticing problems.

Claimant testified that his pain is in the back of his shoulder. He still has trouble with his shoulder, and he cannot pick up anything heavy. He said he cannot even hold a can of pop for five minutes. He cannot raise his shoulder up to his head. Claimant did not seek any medical treatment because it was his understanding that he had to get respondent's approval to see a doctor. However, he also testified that he never specifically asked respondent if he could go to a doctor. Claimant could have sought medical treatment on his own at the VA like he did when he injured his ankle. The fact that he did not suggests this injury may not be as significant as he indicates. Claimant's attorney sent him to see Travis Oller, D.C., in November 2005. Dr. Oller recommends additional treatment.

Mr. Baumgartner is now the manager at respondent but when claimant worked there, he was the assistant manager. He testified that claimant told him in October 2005 that he had hurt himself about two weeks earlier changing prices on an outside sign and was going to file a workers compensation claim. He said that it had been months since claimant had changed the prices because other employees performed that task. When asked if claimant had previously joked about hurting his shoulder changing signs, he said that claimant was always complaining so it was nothing to him. He then said he did not remember if claimant said anything about his shoulder before the conversation in October.

Mr. Baumgartner said that when claimant told him he was going to file a workers compensation claim, he told claimant that respondent would fight it. He denied telling claimant he would be fired if he filed a claim. His testimony was unclear as to whether the conversation he had with claimant about hurting his shoulder while changing signs was the same conversation he had with him about filing a workers compensation claim. Mr. Baumgartner also recalled a telephone conversation with claimant where claimant told him he could not carry buckets outside because his shoulder hurt. He thought this conversation was before claimant told him he was going to file a workers compensation claim, but Mr. Baumgartner was not sure.

Mr. Baumgartner did not file an accident report after claimant told him he was going to file a workers compensation claim. He said respondent had no policy of what to do if an employee is hurt on the job. He testified that there were posters on the wall in the back room, but he did not know what they said.

Mr. Baumgartner said that although he did not work the same shift as claimant, he would still be around the store doing paperwork when claimant came in to work. He did not recall ever seeing claimant holding his shoulder like it was in a sling or not using his arm. When asked if he ever saw claimant act like he was having problems with his

shoulder, he said, "He—sometimes like when customers were around he would act like it hurt."<sup>1</sup>

Mr. Baumgartner stated that he did not terminate claimant but kept him on the schedule with fewer hours. He said this was because of problems claimant was having with customers. He said that claimant failed to show up for work one day, and he took him off the schedule completely at that point. He said that there is a security camera in the store, and he kept a copy of the videotape of claimant's last day of work, which was November 21, 2005. This videotape was offered as an exhibit. Claimant's attorney objected, claiming he was never provided a copy of the videotape although he had made a specific request for any videotape taken. Respondent denies that claimant's request included this type of videotape. The ALJ stated:

Well surveillance tapes tend to lose their value if they're provided to people ahead of time if—if that person is dishonest, because then the dishonest person will tailor their testimony to what's on the surveillance tape. If the witness is honest, there's nothing to fear from. All right. Objection is overruled.<sup>2</sup>

Respondent's attorney stated that if claimant had not testified that he was holding his arm in front of him, could not move it, and could not raise it up above his head, he would not have introduced the tape into evidence. Even so, the videotape was not played in open court, and neither claimant nor his attorney were offered an opportunity to view the videotape and respond to it. However, counsel did not make a specific request to do that at the hearing.

K.S.A. 2005 Supp. 44-551 allows review by the Board from all final orders, awards, modifications of awards or preliminary awards made by an administrative law judge under K.S.A. 44-534a. The decision by the ALJ to deny claimant's objection to the admission of the videotape is not a final order, award, modification of award or preliminary award under K.S.A. 44-534a. Additionally, it is not one of the disputed issues listed in K.S.A. 44-534a(a)(2) which are deemed jurisdictional before the Board. Therefore, the Board finds that claimant's appeal of this issue should be dismissed.

Although Mr. Baumgartner did not believe claimant suffered an injury, his testimony nonetheless supports claimant's testimony that he reported a work-related injury. And it is significant that claimant reported his injury while he was still employed by respondent and before his hours were reduced. This indicates that claimant was not claiming an injury to retaliate for being terminated. In addition, as a series of accidents is alleged, it proves that notice of accident was given to claimant's supervisor within the dates of accident alleged.

---

<sup>1</sup>P.H. Trans. at 43.

<sup>2</sup>*Id.* at 48-49.

Mr. Baumgartner's testimony and the videotape indicate that claimant may have exaggerated his symptoms. But neither establish that claimant was not injured. Claimant never said that he could not use his right arm or that he always favored it. Rather, claimant testified that certain activities would aggravate his injury and that his symptoms would worsen as his work shift continued. As a result, he would tend to stop using or protect his right arm late in his work shift as opposed to early on. Claimant described specific work tasks that aggravated his condition, including activities in October 2005. Based upon the record compiled to date, the Board finds claimant suffered personal injury to his right shoulder by a series of accidents that arose out of and in the course of his employment with respondent and that notice was timely given.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated February 24, 2006, is reversed and remanded to the ALJ for further orders consistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2006.

---

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Jeffrey E. King, Attorney for Respondent  
J. Roger Hendrix, Attorney for Kansas Workers Compensation Fund  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director